Supreme Court, U.S.
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No. 99-180

In The Supreme Court of the United States

CAROL M. KONKEL,

Petitioner,

v.

BOB EVANS FARMS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

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STATEMENT OF THE CASE

A. THE INCIDENT GIVING RISE TO THE LITIGATION.

On March 22, 1994, Carol M. Konkel (hereinafter "Konkel") and her husband had dinner at a Bob Evans Farms Inc. restaurant in Carlisle, Pennsylvania. During dinner, Konkel ordered hot tea. She was brought a carafe full of hot water, a tea bag, and a cup. Konkel placed the tea bag in the carafe of hot water, then poured that liquid into her cup along with sugar and little bit of milk. Konkel drank that tea with her dinner. Later, the waitress poured some additional hot water into her carafe. Konkel put the previously used tea bag back into the carafe, let it steep, poured some of that liquid back into her cup and added more milk and sugar. Konkel then took one swallow of her tea, noticed that it tasted soapy and felt a burning sensation in her throat. It was later determined that the waitress had inadvertently refilled the carafe with a clear solution of water and Eco-line Finish cleaning detergent that

Bob Evans used to clean its coffee pots. This detergent is similar to everyday Cascade used in household dishwashers.

The Konkels notified the restaurant manager that the tea tasted soapy. The manager immediately contacted the local poison control office who advised that Konkel should drink milk and go to the emergency room if she had continued problems. Pursuant to these instructions, Konkel drank milk at the restaurant. She also had a glass of water and reported that these liquids soothed her discomfort and she and her husband left to finish their trip home to Virginia.

After the Konkels left the Bob Evans Farms, Inc. restaurant, they decided to stop at the Chambersburg Hospital emergency room where Mrs. Konkel was examined by Dr. Lawrence John Boyler. Although he did not see any swelling inside Konkel's mouth and he did not know the cause of the slightly red appearance of Konkel's throat, Dr. Boyler diagnosed her as suffering from esophageal chemical burns by

history given to him. Approximately one hour after her arrival at the hospital, Konkel indicated that she was feeling much better and that she had only slight discomfort. Dr. Boyler told Konkel that she would recover rapidly. The Konkels then left the hospital and drove to their home in Virginia.

Konkel neither sought nor received any additional medical treatment or care for her throat/esophagus until approximately eight months later when she was examined by her family physician, Dr. Edward Cullen, on November 3, 1994. Thereafter Konkel sought sporadic treatment and had diagnostic tests performed by various health care providers, including two gastroenterologists. The results of these tests were all normal and no objective findings were ever noted to this ingestion of a small amount of simple dish detergent.

Dr. Nicholas Snow, one of Konkel's gastroenterologists, eventually diagnosed her as suffering from heightened visceral nociception (HVN) of the esophagus. Dr.

Snow conceded that the test results of Konkel's esophagus were normal, and that his diagnosis of heightened visceral nociception was not based upon any of the diagnostic tests. When asked about Konkel's prognosis, Dr. Snow stated that he could not predict whether she was going to get better or worse, that HVN can come and go, and that this condition could stop at any time and never come back. Dr. Snow came to his opinion of HVN solely upon the subjective statements of Konkel. This claim lacked objective medical evidence and was based upon the speculative opinion of one doctor. Dr. Snow, who advocated for his patient, was unable to render a clear opinion on when this condition would end. Dr. Kalloo, Bob Evans Farms, Inc.'s medical expert, opined that the data was insufficient to diagnose Konkel with HVN and that her esophagus was normal.

In addition to the speculative nature of her claimed medical condition, Konkel produced no objective physical

evidence concerning her injury, no evidence of lost wages, no evidence of lost future earning capacity, no evidence of loss of future employment or out-of-pocket expenses.

B. LITIGATION HISTORY.

Carol Konkel filed a Motion for Judgment in the Circuit Court of Clarke County, Virginia on March 26, 1996 against Bob Evans Farms, Inc. and co-defendant, Ecolab, Inc.[1] In her action, Konkel alleged that Bob Evans Farms, Inc. "carelessly, recklessly, and negligently served the plaintiff Eco-line Finish" and that Bob Evans Farms, Inc. "breached its expressed and implied warranties". The only relief requested against Bob Evans Farms, Inc. was compensatory damages. Konkel also sought punitive damages against co-defendant, Ecolab, Inc.

Bob Evans Farms, Inc. removed the case to the United States District Court for the Western District of Virginia and a discovery deadline of December 31, 1996 was imposed by that

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[1]Co-defendant, Ecolab, Inc. settled the claims of the plaintiff and was dismissed from this case prior to trial.

court. During discovery, Bob Evans Farms, Inc. propounded an Interrogatory to Konkel requesting a detailed itemization of her claim for monetary damages. Konkel initially answered as follows:

> Documents setting forth medical expenses already incurred have been previously provided. In addition, I expect to incur additional medical expenses in the future. My damages for past, present and future pain and suffering, past and future medical bills, are calculated at $1,000,000.00. I will supplement this Interrogatory as I receive additional medical bills.

On December 27, 1996, four days before the end of discovery, Konkel filed a supplemental answer, stating for the first time that she was seeking punitive damages against Bob Evans Farms, Inc., although she provided no facts to support such relief. Konkel never provided any alleged facts to support her last minute claim for punitive damages against Bob Evans Farms, Inc., until December 31, 1996, the date on which discovery ended, when she filed Second Supplemental Answers to Interrogatories.

Because of Konkel's failure to timely raise this new claim of punitive damages, her failure to amend her pleadings to request such relief, and the inherent unfairness of injecting a new claim at the very end of discovery, Bob Evans Farms, Inc. filed a motion to exclude Konkel's belated claim for punitive damages. Konkel responded by filing a Motion for Summary Judgment on the punitive damage issue.

A hearing on these matters was held on February 7, 1997 in which the trial court denied Konkel's claim for punitive damages and her oral request for leave to amend her complaint to include punitive damages. (Petition for a Writ of Certiorari, Appendix E, p. 29a.)

The case went to trial on April 15-17, 1997. After deliberations, the jury returned a verdict in favor of Konkel in the amount of $1,000,000.00. Bob Evans Farms, Inc. filed post-trial motions which were denied by the district court.

Bob Evans Farms, Inc. timely appealed the trial court's

denial of its various post-trial motions, and Konkel filed a cross-appeal based upon the trial court's granting of Bob Evans Farms, Inc.'s Motion in Limine to preclude evidence of punitive damages.

The Fourth Circuit affirmed the trial court's granting of the Motion in Limine on the punitive damages claim, the trial court's decision denying Bob Evans Farms, Inc.'s Fed. R. Civ. P. 50(b) motion and Bob Evans Farms, Inc.'s Fed. R. Civ. P. 60(b)(6) motion. However, the Fourth Circuit vacated the trial court's denial of Bob Evans Farms, Inc.'s Fed. R. Civ. P. 59(a) motion for a new trial based on the excessive compensatory damage award, and ordered the plaintiff to accept a reduced compensatory damage award of $25,000.00 or elect to proceed with a new trial nisi remittitur at Konkel's option. In support of its decision, the Fourth Circuit held as follows:

> [w]hen the lack of this evidence is viewed in connection with Konkel's evidence concerning the severity of permanency of her injury, it becomes evident that Pennsylvania courts

would view this compensatory damage award as excessive.

(Petition for Writ of Certiorari, App. A., pg. 14a-15a).

Following this decision, Konkel filed a petition for a re-hearing with a suggestion for a rehearing en banc. This petition was denied.

REASONS FOR DENYING THE WRIT

I. THE FOURTH CIRCUIT'S REVERSAL OF THE DISTRICT COURT'S DENIAL OF BOB EVAN'S FARMS, INC.'S MOTION FOR A NEW TRIAL BASED UPON FEDERAL RULE OF CIVIL PROCEDURE 59(a) AND AWARDING THE PLAINTIFF A REMITTITUR OF $25,000.00 OR THE OPTION OF A NEW TRIAL WAS PROPER AND DID NOT VIOLATE THE SEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

1. An appellate court's reversal of a trial court's denial of a motion for a new trial based on the excessiveness of the jury verdict, and ordering a remittitur of $25,000.00 or the option of a new trial does not violate the Seventh Amendment of the United States Constitution.

In Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 116 S.Ct. 2211, 135 L.Ed. 2d 659 (1996), this Court

addressed the issue of an appellate court's review of a trial court's ruling on a motion regarding the excessiveness of a verdict and explicitly held that "nothing in the Seventh Amendment precludes appellate review of the trial judge's denial of a motion to set aside a jury verdict as excessive". 116 S.Ct. at 2224. In that case, this Court reviewed the Seventh Amendment which states as follows:

> [i]n suits of common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, then according to the rules of the common law.

U.S. Const., AMDT 7.

In Gasperini, contrary to Konkel's contentions, this Court clearly noted that the re-examination clause of the Seventh Amendment does not prohibit the trial judge from granting a new trial when the jury's verdict is excessive. 116 S.Ct. at 2222. Moreover, this Court determined that appellate review under an abuse of discretion standard is reconcilable

with the Seventh Amendment as the control necessary and proper for the fair administration of justice. 116 S.Ct. at 2223.

The issue of whether or not an appellate court can order a remittitur of a jury verdict and not run afoul of the Seventh Amendment was also addressed in Hetzel v. Prince William County, Virginia, 523 U.S. 208, 118 S.Ct. 1210, 140 L.Ed. 336 (1998). In Hetzel, this Court reviewed a case where an appellate court had ordered a remittitur of a jury award without giving the plaintiff the option of a new trial. Under those facts, this Court held that it would be a violation of the Seventh Amendment for an appellate court to order a remittitur without the option of a new trial. Id. at 1211-12. Conversely, there is no violation of the Seventh Amendment where an appellate court orders remittitur with the option of a new trial and in fact, this Court approvingly cited the case of Dimick v. Schiedt, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935) (a reaffirmation of the practice of conditionally remitting damages and that, where

a verdict is set aside as grossly excessive, the parties remain entitled to opt for a new trial). Hetzel, supra, at 1212.

Furthermore, Konkel's reliance on Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 118 S.Ct. 1279, 140 L.Ed. 2d 438 (1998) is misplaced and inappropriate. The Feltner case dealt with the right to a jury trial under the Copyright Act, 17 U.S.C. §504(c). In that case, this Court stated that the Seventh Amendment does provide a right to a jury trial on all issues pertinent to an award of statutory damages under §504(c) of the Copyright Act. 118 S.Ct. at 1286. However, nothing in the Feltner opinion dealt with the trial court's decision of whether to vacate a jury verdict for excessiveness or appellate review of that decision. Feltner is distinguishable and is of no controlling authority in this matter.

Contrary to Konkel's assertions, in Gasperini, it is clear that an appellate court has authority to review a district court's denial of a motion to set aside an award as excessive, and the

Hetzel case makes clear that a remittitur of a jury award by an appellate court with the option of a new trial does not run afoul of the Seventh Amendment. Thus, the opinion of the Fourth Circuit in this matter is correct and does not require review bu this Court.

2. The Fourth Circuit applied the correct standard of review in reviewing the district court's denial of Bob Evans Farms, Inc.'s Motion for a New Trial pursuant to Federal Rule of Civil Procedure 59(a).

We agree that under Gasperini, a federal trial court's review of a verdict for excessiveness in a diversity of citizenship case is done by application of state law. We also agree that the applicable state law in this case is Pennsylvania. The Fourth Circuit properly applied Pennsylvania substantive law in its review of the district court's actions. An appellate court's review of a district court's denial of a Rule 59(a) motion for a new trial based upon the alleged excessiveness of the jury's compensatory damage award is under an abuse of

discretion standard. Gasperini v. Center for Humanities, Inc., 116 S.Ct. at 2223.

Under Pennsylvania law, a jury's damage award is excessive if it does not fall "somewhere within the necessarily uncertain limits of fair and reasonable compensation in a particular case, or whether the verdict so shocks the sense of justice as to compel the conclusion that the jury were influenced by partiality, prejudice, mistake or corruption." Carminati v. Philadelphia Transportation Company, 405 Pa. 500, 176 A.2d 440, 445 (1962). This standard was used by the Fourth Circuit and specifically referenced in their opinion (Petition for a Writ of Certiorari, Appendix A, p. 14a). The Fourth Circuit applied the correct Pennsylvania law using the following factors to determine whether a jury's damage award is grossly excessive: (1) the severity of injury; (2) whether the injury is demonstrated by objective physical evidence or subjective evidence; (3) whether the injury is permanent; (4)

the plaintiff's ability to continue employment; (5) the disparity between the out of pocket expenses and the amount of the verdict; and (6) the damages the plaintiff requested in his complaint. Stoughton v. Kinzey, 299 Pa. Super. 499, 445 A.2d 1240, 1242 (1982). The Fourth Circuit recognized that Pennsylvania courts examine only the above factors relevant to the particular case at issue. Mineo v. Tancini, 349 Pa. Super. 115, 502 A.2d 1300, 1305 (1986).

Although Konkel relies heavily on the Pennsylvania cases of Catalano v. Bujak, 537 Pa. 155, 642 A.2d 448 (1994) and Botek v. Mine Safety Appliance Corp., 531 Pa. 160, 611 A.2d 1174 (1992), these cases do not conflict with or overrule the Pennsylvania law contained in the Carminati and Stoughton cases. Thus, Konkel's assertions that "the Fourth Circuit ignored the applicable substantive law as set forth in the decisions of the Pennsylvania Supreme Court" are erroneous. (Petition for a Writ of Certiorari, p. 14).

In Catalano v. Bujak, 537 Pa. 155, 642 A.2d 448 (1994), the Supreme Court of Pennsylvania held that it is unwarranted to reduce or modify a verdict for personal injury unless unfairness, mistake, partiality, prejudice or corruption is shown, or the damages appear to be grossly exorbitant, or so excessive as to offend the conscience and judgment of the court. Id. at 451. This is the same standard, albeit in slightly different language as the Pennsylvania Supreme Court enunciated in Carminati, cited by the Fourth Circuit.

In Botek v. Mine Safety Appliance Corp., 531 Pa. 160, 611 A.2d 1174 (1992), the plaintiff was awarded a jury verdict in the amount of $350,000.00 after he was injured by inhaling carbon monoxide which was mistakenly put in an oxygen tank. The appellate court found this damage award to be excessive and, instead of remanding it for a new trial, granted remittitur, reducing the plaintiff's jury award to his actual out of pocket medical expenses of $783.05. The Pennsylvania Supreme

Court found this remittitur without the option of a new trial to be in error and re-instated the original jury verdict. The Botek case did not change the fact or law that an appellate court can overturn a trial court's decision not to grant a new trial when the verdict is excessive or grossly exorbitant, or when there is an abuse of discretion, or error of law which affected the verdict or outcome of the case. Id. at 1176.

The Pennsylvania cases cited and relied upon by the Fourth Circuit are consistent with the cases cited by Konkel. Under Pennsylvania law, an appellate court has the ability to review a trial court's ruling as to whether a jury's award is grossly excessive and can overturn a trial court's decision on that issue. Here, the cases relied upon by Konkel do not modify or overrule the legal standards set out in Carminati or Stoughton, but are cases where the same standard was applied with a different factual result. Consequently, these cases give further support to the Fourth Circuit's decision.

In the present case, there was a clear abuse of discretion by the trial judge in denying Bob Evans' Rule 59(a) Motion for a New Trial. The jury verdict was grossly exorbitant and excessive and did not conform to the evidence. In reviewing this issue, the Fourth Circuit applied the standard set out in Stoughton v. Kinzey, supra, and specifically evaluated and assessed the lack of any objective evidence to substantiate Konkel's subjective complaints. In its opinion, the Fourth Circuit noted that (1) there was no objective physical evidence of injury; (2) no evidence of lost wages; (3) no evidence of lost future earning capacity; (4) no evidence of lost future employment; and (5) no evidence of out of pocket expenses. The appellate court also considered the evidence concerning the severity of her injury and permanency of her injury. (Petition for a Writ of Certiorari, Appendix A, p. 14a).

When the Fourth Circuit examined all of these factors under Stoughton v. Kinzey, supra, it determined that the

Pennsylvania courts would have viewed Konkel's $1,000,000.00 compensatory damage award as excessive. The Fourth Circuit specifically stated that "in our view, taking into account the relevant factors under Pennsylvania law, an award of $25,000.00 is the outermost award that could be sustained". (Petition for a Writ of Certiorari, Appendix A, p. 15a).

Konkel disingenuously asserts that the primary factor examined by the Fourth Circuit in making its decision was the lack of evidence of special damages. To the contrary, the appellate court set forth many separate factors which were considered in evaluating whether the jury's verdict was grossly exorbitant. Such factors included the lack of any objective evidence to substantiate her subjective complaints of discomfort, the severity, and the issue of permanency. (Petition for a Writ of Certiorari, Appendix A, p. 14a).

Based on the above, there is no dispute that the correct standards were applied by the Fourth Circuit, and that its

decision was properly reached and supported by both the law and the facts of this case.

II. THE PETITION SHOULD NOT BE GRANTED BECAUSE THE FOURTH CIRCUIT CORRECTLY INTERPRETED THE REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 8(a), 54(c), 56, AS WELL AS THE PENNSYLVANIA LAW PERTAINING TO THE REQUIREMENT TO PLEAD A CLAIM FOR PUNITIVE DAMAGES.

Federal Rule of Civil Procedure 8(a) requires "a short and plain statement of the claim showing that the pleader is entitled to relief". In support of a punitive damage claim against Bob Evans Farms, Inc., as required, Konkel's Motion for Judgment must have alleged facts which, if proven, would have entitled her to punitive damages against Bob Evans Farms, Inc.

Under Pennsylvania law, an essential fact which must be pled to support a claim for punitive damages is that the defendant's conduct was "outrageous." Smith v. Brown, 283 Pa. Super. 116, 423 A.2d 743, 745 (1980). Outrageous conduct

is an act committed with bad motive or reckless indifference to the interest of others. Id.

In Smith v. Brown, supra, the Pennsylvania appellate court addressed the pleading of "recklessness" necessary to give rise to a punitive damage claim. The plaintiff sought recovery for injuries arising out of an automobile accident as well as punitive damages. In support of her punitive damages claim, the plaintiff alleged that the defendant drove her car in a "wanton and reckless manner". The plaintiff also alleged the following facts to support this claim:

> Operation of the motor vehicle at a high and excessive rate of speed under the circumstances; failure to have the motor vehicle under proper and adequate controls; failure to have due regard for the point and position of the plaintiff pedestrian; violation of the ordinance of Montgomery County and the statutes of the Commonwealth of Pennsylvania; and, otherwise failing to exercise due care under the circumstances. Id. at 744.

The Pennsylvania court held that these allegations were insufficient to put Brown, the defendant, on notice as to what

"outrageous" conduct was being alleged. The court held that the plaintiff failed to properly state a claim for punitive damages. Id. at 745.

Similarly, in this case, Konkel's allegations are insufficient under Pennsylvania law to put Bob Evans Farms, Inc. on notice as to what "outrageous" conduct was being alleged. In her Motion for Judgment, Konkel alleges that Bob Evans Farms, Inc. "carelessly, recklessly, and negligently served the plaintiff Eco-line Finish" and that "by serving the plaintiff Eco-line Finish, a highly alkaline caustic industrial cleaner, Bob Evans breached its expressed and implied warranties". Here, as in Smith, the allegations are insufficient to put Bob Evans on notice as to what specific outrageous conduct was being alleged, and are only conclusions, not facts.

Furthermore, in Smith, the plaintiff did request punitive damages against the defendant in her complaint. Here, Konkel made no such demand or request in her Motion for Judgment.

In fact, Konkel never sought leave to amend her Motion for Judgment to include punitive damages prior to the close of discovery. Instead, Konkel first raised the claim in a supplemental Interrogatory response, filed just before discovery cutoff, without providing any facts to substantiate her claim. Konkel delayed providing her claimed basis for such relief until the day discovery closed. Because of the inherent unfairness in defending against a new claim made at the close of discovery, Bob Evans filed a motion to exclude Konkel's claim for punitive damages. Konkel first sought leave to amend her pleadings until approximately two months after the close of discovery.

The Fourth Circuit correctly applied Pennsylvania law in affirming the trial court's granting of a Motion in Limine to Bar Evidence of Punitive Damages and in denying Konkel's last minute motion to orally amend her Motion for Judgment to claim punitive damages. The Fourth Circuit reviewed the

evidence and held that the facts did not support an award for punitive damages under Pennsylvania law even if properly plead because Bob Evans Farms, Inc.'s conduct was devoid of being "malicious, wanton, reckless, willful or oppressive". Citing Feld v. Merriam, 506 Pa. 373, 485 A.2d 742, 747-48 (1984). (Petition for a Writ of Certiorari, Appendix A, p. 17a). The Fourth Circuit correctly viewed this case as a simple negligence and warranty claim.

In addition, Konkel did not follow the proper procedure under the rules in which to state her claim for punitive damages. Konkel relies on Fed. R. Civ. P. 54(c) which provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if that party has not demanded such relief in the party's pleadings". However, Konkel's reliance on this rule is erroneous. By its explicit language, Fed. R. Civ. P. 54 deals with the entry of final judgments being conformed to the

evidence presented. Federal Rule of Civil Procedure 15 is the rule which deals with the amendment of pleadings. Konkel inappropriately attempts to use the judgment provisions of Rule 54 to avoid informing a defendant of her claims. Konkel's counsel admitted as much in the February 7, 1997 hearing on this issue when he stated:

> You don't have to have the pleadings changed to get the relief. If that were the case, under 54(c), 54(c) would say, if you want to do that, then see Rule 15. It doesn't. It says it doesn't matter what the pleadings say. You can get the relief to which you are entitled. We are going to be entitled to punitive damages. [emphasis added]. (Petition for a Writ of Certiorari, Appendix A, p. 34a-35a).

Konkel also ignores Fed. R. Civ. P. 8(c) which states that a pleading setting forth the claim of relief shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief and the demand for judgment for the relief the pleader seeks". Under Konkel's mistaken interpretation of Rule 54(c), a plaintiff would not have to follow Fed. R. Civ. P.

8(a) or Fed. R. Civ. P. 15 in order to receive relief. Plaintiff would merely present evidence at trial that he is entitled to a specific form of relief. Konkel's interpretation of the Federal Rules of Civil Procedures is illogical and defies the fundamental fairness of the notice pleading requirement.

The district court granted Bob Evans Farms, Inc.'s Motion in Limine because the claim was not properly pled and the defendant was not on notice of such a claim. The district court specifically distinguished the requirements of Fed. R. Civ. P. 54(c) finding that the rule was inapplicable.

Konkel contends that, if the Fourth Circuit's decision is permitted to stand, this Court will be encouraging every personal injury plaintiff to seek punitive damages. This premise is flawed since the Fed. R. Civ. P. require a good faith factual basis for seeking punitive damages. If such a belief does not exist, the claim should not be pled, and in some cases sanctions could be imposed. If facts come to light which

support a claim for punitive damages, a plaintiff is free to petition the court to amend the pleadings. Unlike this case, the motion to amend pleadings should be in written form and prior to the close of the discovery with facts to support it. Here, Konkel had no such facts and never made the required request to amend her claim.

III. THE PETITION SHOULD BE DENIED BECAUSE GRANTING IT WOULD BE A WASTE OF JUDICIAL RESOURCES.

The Fourth Circuit has ordered a remittitur of Konkel's jury award to $25,000.00, and has given her the option of accepting that remittitur or having a new trial. For this Court to consider the Petition for a Writ in a case where Konkel has the clear option of accepting the remittitur or having a new trial is premature and a waste of judicial resources.

CONCLUSION

There is no dispute as to the proper legal standards governing the issues in this case. The Fourth Circuit in its

carefully considered opinion applied the standards all parties agree are controlling, examined them in light of the facts of the case, and arrived at a proper conclusion.

The law authorizes an appellate court to review a district court's decision on a Motion for a New Trial under Fed. R. Civ. P. 59(a). The law permits the appellate court to order a remittitur to the plaintiff if it also grants the plaintiff the option of a new trial, which the court did.

The Fourth Circuit correctly applied Pennsylvania standards of appellate review to the facts in this case and came to a well-reasoned and correct decision. The Fourth Circuit did not err in finding that the district court erred in denying Bob Evans' Rule 59(a) motion for a new trial. Under the facts of this case, the verdict was grossly exorbitant which necessitated offering Konkel the option of a new trial or remittitur.

Konkel's claims that she is entitled under Fed. R. Civ. P. 54(c) to present a claim for punitive damages when no such

claim was made in her pleadings ignores the requirements of Fed. R. Civ. P. 8(a) and 15. Rule 54(c) does not apply because the district court's decision regarding punitive damages was a pre-trial matter, whereas Fed. R. Civ. P. 54(c) pertains to conforming pleadings to the proof made at trial. Moreover, Konkel never moved to amend her pleadings to state such a claim until her counsel did so orally almost two months after the close of discovery.

WHEREFORE, for the foregoing reasons, Bob Evans Farms, Inc., by counsel, respectfully requests that this Honorable Court deny Konkel's Petition for Writ of Certiorari.

Respectfully submitted,

BOB EVANS FARMS, INC.
By Counsel

TRICHILO, BANCROFT, McGAVIN,
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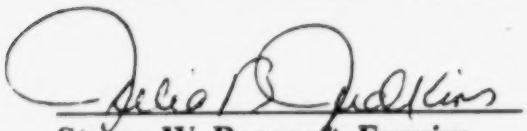

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